Supreme Court, U.S.
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No. 95-25

In the Supreme Court of the United States

OCTOBER TERM, 1995

ORD & NORMAN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's denial of a motion to quash a grand jury subpoena directed to an accountant employed by an attorney representing the party being investigated by the grand jury was a final order subject to immediate appeal.

2. Whether the court of appeals abused its discretion in denying a petition for a writ of mandamus directing the district court to quash the subpoena.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-19a) is reported at 51 F.3d 203. The opinion and order of the district court (Pet. App. 20a-34a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 1995. A petition for rehearing was denied on June 7, 1995. Pet. App. 39a-40a. The petition for a writ of certiorari was filed on July 3, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In March 1992, an Internal Revenue Service agent contacted former petitioner Edward Silva, Jr., concerning an audit of his individual income tax return for 1989.[1] Pet. App. 21a. Silva referred the agent to Charles Bailin, who for some 20 years had been Silva's accountant and had prepared tax returns for Silva and his company, former petitioner Silva Harvesting, Inc. In April 1992, the agent informed Bailin that the audit had been expanded to include Silva Harvesting's 1990 tax return. Bailin then recommended that Silva engage a tax attorney in connection with the audit. In April 1992, Bailin introduced Silva to petitioner Edward Ord. At that meeting, Silva engaged Ord to represent him in the audit, and Ord retained Bailin and his accounting firm to act as Ord's "sub-agent[s]" in connection with the representation. Bailin testified that all the actions he took in connection with the audit after Ord was retained were taken at Ord's direction. *Id.* at 8a-9a, 20a-22a.

In July 1992, the revenue agent gave Bailin a list of ten cash payments that had been made to Silva Harvesting in 1989, and requested that he trace them into Silva's books and records to determine whether they had been reported as income. Pet. App. 9a. The agent told Bailin that she suspected that the cash paid to Silva had been used illegally. Bailin undertook the requested inquiry, and in December 1992 he disclosed

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[1] The petitions of Edward Silva, Jr., and Silva Harvesting, Inc., for a writ of certiorari in this case were dismissed on September 26, 1995, under Rule 46 of the Rules of this Court. See pages 6-7, *infra*.

to the agent that he could trace only two of the cash payments into Silva Harvesting's records. Bailin testified that he made that disclosure under the direction and control of Ord. *Id.* at 9a, 23a-24a.

The revenue agent subsequently referred the case to the IRS's Criminal Investigation Division, and in March 1994 an agent from that Division served Bailin with a grand jury subpoena demanding his testimony and the production of various documents. Pet. App. 9a-10a; Gov't C.A. Br. 9. The required documents included those related to the cash-tracing project, as well as all notes of conversations with the original revenue agent, Silva, or Silva's employees relating to that inquiry. Pet. App. 9a-10a. Silva moved to quash parts of the subpoena directed to Bailin, on the ground that the information sought was protected by his attorney-client privilege. See *id.* at 27a.

2. The district court held an evidentiary hearing and then, with one exception not relevant here, denied the motion to quash. Pet. App. 20a, 27a-29a. The court found that Bailin was employed as Ord's sub-agent in Ord's performance of legal work for Silva. *Id.* at 22a-23a, 25a. The court indicated, however, that it was "extremely doubtful" whether the results of Bailin's investigation, which was undertaken in response to an inquiry from the IRS rather than one from Ord, could represent or embody the sort of confidential communication, made for the purpose of seeking legal advice, that is protected by the attorney-client privilege. *Id.* at 24a-25a. In any event, the court concluded that, even if the privilege applied, it was waived by Bailin's December 1992 disclosure of the results of his investigation to the IRS at Ord's direction. *Id.* at 25a. Finally, the court held that no

attorney "work product" privilege ever attached to Bailin's investigation, again because it was initiated at the IRS's request, "not by any inquiry germane to Ord's representation" of Silva and Silva Harvesting. *Id.* at 25a-26a.

3. The court of appeals stayed the district court's order enforcing the subpoena, expedited the appeal filed by Silva, Silva Harvesting, and remaining petitioners Ord, Edward O.C. Ord, Inc., and Ord & Norman, and directed the parties to brief the issue of appellate jurisdiction. Pet. App. 35a-38a. The same parties also sought review of the district court's order through a petition for a writ of mandamus, which the court of appeals consolidated with the appeal. See *id.* at 2a, 7a-8a, 18a-19a.

After briefing and argument, the court of appeals dismissed the appeal for lack of jurisdiction and denied the petition for mandamus. Pet. App. 8a, 10a. The court first noted (*id.* at 11a) that the denial of a motion to quash normally is not appealable as a final order, but may be challenged immediately only by refusing to comply and then appealing from a final order of contempt. The court recognized a "narrow exception" to that rule, rooted in this Court's decision in *Perlman* v. *United States*, 247 U.S. 7 (1918), "where the subpoena is directed at a third party who 'cannot be expected to risk a contempt citation' in order to preserve the movant's right to appeal." *Id.* at 11a. The court explained, however, that it had previously held that the *Perlman* exception does not apply if the subpoena is directed to an attorney who is currently representing the movant in connection with the grand jury proceedings. *Id.* at 11a-13a. Under those circumstances

the movant is not powerless to control the actions of the subpoenaed party, and it would be "particularly inappropriate to extend the exception to third-parties who are participants in the confidential relationship upon which the movant's claim of privilege is based." *Id.* at 13a.

Applying the same rationale, the court concluded that the *Perlman* exception to the rule of non-appealability should not apply in cases like this one, where the subpoenaed party is a non-attorney agent of the movant. Pet. App. 10a, 14a. The court observed that Bailin was retained by Silva's attorney to represent Silva in a confidential, fiduciary capacity, and was therefore to some degree subject to Silva's control. *Id.* at 14a. More important, in the court's view, Bailin was "necessarily a party to the relationship upon which Silva's entire claim of privilege is based." *Ibid.* The court held that it was "in precisely these circumstances that a third party *can* be expected to risk contempt in order to protect the privileged relationship." *Id.* at 14a-15a.[2]

The court of appeals rejected any distinction based on the fact that Bailin is an accountant rather than an attorney. Pet. App. 15a. The court pointed out that its prior cases declining to extend the *Perlman* exception to agency relationships were based not on any special fiduciary obligations of attorneys, but on the "present, confidential nature of the movant's agency relationship with the third party, and the fact that the relationship was related to the grand

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[2] The court noted that if a principal directs an agent to resist a court order to comply with a subpoena, "it may be appropriate for the contempt sanctions to be directed at the principal." Pet. App. 15a n.1.

jury investigation." *Ibid.* The court concluded that extension of the rule to non-attorney confidential agents was "consistent with a strict application of the final judgment rule in the grand jury process, designed to prevent parties from taking frivolous appeals for the purpose of delay." *Id.* at 15a-16a.

Having held that the district court's order was not final for purposes of appeal, the court declined to invoke "hypothetical jurisdiction" to resolve the issue before it on the merits. Pet. App. 16a-17a. The court also denied what it termed "Silva's eleventh-hour petition for review of the district court's order by extraordinary writ." *Id.* at 18a. Observing that such writs are not to be used to avoid the final judgment rule, the court held that a district court's ruling on a motion to quash may not be reviewed on a petition for mandamus unless it "amount[s] to a judicial 'usurpation of power.'" *Ibid.* The court found no such abuse in the district court's exercise of its jurisdiction in this case. *Id.* at 18a-19a.

The court of appeals denied an application to stay its mandate. On July 7, 1995, Justice O'Connor denied a similar application.

ARGUMENT

1. Recent events have rendered this case moot.

After this Court declined to stay the court of appeals' mandate, Charles Bailin appeared before the grand jury. He refused to comply with the district court's order that he produce the subpoenaed documents, and on August 10, 1995, that court found him in contempt.

On August 22, 1995, the United States and former petitioner Edward Silva entered into a plea agreement under which Silva agreed, among other things, to

waive indictment and to plead guilty to a charge of willfully signing and filing a false corporate income tax return for Silva Harvesting for its 1988 tax year. Silva also agreed to move to dismiss his petition for a writ of certiorari in this case. Plea Agrmt. ¶ 1(a) and (f). The government agreed, among other things, to move to dismiss the contempt charge against Bailin; not to file any additional criminal charges against Silva, Silva Harvesting, or Silva Harvesting's employees for known offenses arising out of the criminal investigation conducted by the IRS and the grand jury; and to discontinue the pending grand jury investigation of Silva, Silva Harvesting, and its employees, including withdrawing any pending grand jury subpoenas. Plea Agrmt. ¶ 3(a), (c) and (d).

The district court accepted the plea agreement on August 22, 1995, and on August 24 it entered an order purging Bailin's contempt. App., *infra*, 1a. On September 7, petitioners Silva and Silva Harvesting asked this Court to dismiss their petition as moot, because of the plea agreement and because "the grand jury subpoena of Bailin has been withdrawn and the grand jury investigation is terminated." Mot. to Dismiss 2. The motion was granted, as to those petitioners, on September 26, 1995.

The real parties in interest on appeal in this case were Edward Silva and his company, Silva Harvesting.[3] Any evidentiary privilege asserted in the case belonged primarily to them, not to their lawyers. Now that those parties have dismissed their petitions,

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[3] Charles Bailin, to whom the subpoena in question was directed, did not participate in the appeal of the district court's order denying the motion to quash. See Pet. iii.

however, the only remaining petitioners are their attorney, Edward Ord, his professional corporation, and his law firm.[4]

The motion to dismiss filed by Ord on behalf of his clients requests that this Court continue to entertain the petition on behalf of the other petitioners alone, on the ground that "the issue of work product is still at issue and the other petitioners regularly represent clients who are being investigated by the IRS. The current decision of the Ninth Circuit puts all the work product of the firm's clients in jeopardy in the future." Mot. to Dismiss 2. But even if the remaining petitioners had an independently cognizable interest in asserting the work-product privilege (as opposed to the attorney-client privilege, which is exclusively that of the client) with respect to particular documents involved in this case (see, *e.g.*, *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1466 (10th Cir. 1983)), the government is no longer seeking any of those documents. Petitioners' speculative assertion of possible interference with the general interests of unnamed future clients is not the sort of "definite and concrete" controversy necessary to support the exercise of jurisdiction by a federal court.[5] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227,

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[4] The court of appeals' opinion lists only the professional corporation and the law firm as appellants. Pet. App. 2a, 7a. The amended notice of appeal filed in the district court on September 29, 1994, however, also listed Ord in his individual capacity.

[5] The original controversy in this case is not likely to recur between the real parties in interest. Under the plea agreement, the government has withdrawn all pending subpoenas, discontinued the pending grand jury investigation, and agreed

240-241 (1937) (jurisdiction requires "a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts"); see also, *e.g.*, *Lake Coal Co.* v. *Roberts & Schaefer Co.*, 474 U.S. 120 (1985) (per curiam) (denying motion to decide questions presented despite complete settlement of the underlying causes of action); *Iron Arrow Honor Soc'y* v. *Heckler*, 464 U.S. 67, 71 & n.1 (1983) (per curiam); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971) (per curiam); *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969) (questions "must be presented in the context of a specific live grievance"). The petition for a writ of certiorari on behalf of the remaining petitioners should therefore be dismissed as moot.[6]

2. In any event, the court of appeals correctly held that the district court's denial of the motion to quash the grand jury subpoena in this case was not a final order appealable under 28 U.S.C. 1291. As petitioner concedes (Pet. 12), such an order is ordinarily not subject to immediate appeal. A party wishing to challenge the order must instead refuse to comply,

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not to file further criminal charges for any other offenses discovered as part of the underlying criminal investigation. The contempt citation issued to accountant Bailin has been purged. Nor is the question presented one that will likely evade review in any future case that is not settled by agreement of the parties in interest. See, *e.g.*, *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-319 (1974) (per curiam).

[6] Because this case became moot through voluntary actions of the parties in interest taken after the court of appeals' decision had become final, there is no reason to vacate the decision below. *U.S. Bancorp Mortgage Co.* v. *Bonner Mall Partnership*, 115 S. Ct. 386 (1994).

and then appeal from any ensuing judgment of contempt. *United States* v. *Ryan*, 402 U.S. 530 (1970); *Cobbledick* v. *United States*, 309 U.S. 323 (1940). Indeed, that is the course that was followed after the court of appeals' decision in this case, although the case was ultimately resolved through the plea agreement before there was any occasion for appeal of the contempt order entered against accountant Bailin.

This Court has recognized an exception to the general rule of nonappealability for cases like *Perlman* v. *United States*, 247 U.S. 7 (1918), in which the lower court's order is directed not to a party with an interest in challenging the order, but to "a disinterested third party * * * [who] presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology* v. *United States*, 113 S. Ct. 447, 452 n.11 (1992); see also *Ryan*, 402 U.S. at 533; *United States* v. *Nixon*, 418 U.S. 683, 691 (1974). As the court of appeals recognized (Pet. App. 15a-16a), however, that exception should be narrowly construed, because of the "strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals" (*Nixon*, 418 U.S. at 690), which "is at its strongest in the field of criminal law." *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam); see also *Ryan*, 402 U.S. at 532-533; *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); *In re Sealed Case*, 655 F.2d 1298, 1301-1302 (D.C. Cir. 1981) (R.B. Ginsburg, J.). The court properly—and, as subsequent events demonstrated, correctly—concluded (Pet. App. 14a-15a) that a confidential agent like Bailin would have adequate incentive to risk a contempt citation in

order to preserve his principal's ability to appeal, so that the case did not fall within "the limited class of cases where denial of immediate review [of the order enforcing the subpoena] would render impossible any review whatsoever of [the principal's] claims." *Ryan*, 402 U.S. at 533.

As petitioners point out (Pet. 12-20), the courts of appeals have adopted somewhat different approaches to application of the *Perlman* exception in cases where a subpoenaed third party is an officer, attorney, or other confidential agent of the party seeking to appeal denial of a motion to quash. Compare, *e.g.*, Pet. App. 11a-16a (not applicable to current agent with confidential relationship related to grand jury proceeding), *Corporacion Insular de Seguros* v. *Garcia*, 876 F.2d 254, 258-259 (1st Cir. 1989) (not applicable to attorney or close aide), and *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1465-1466 (not applicable to attorney unless client can prove attorney will not risk contempt) with, *e.g.*, *In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199, 201-203 & n.3 (5th Cir. 1981) (client may appeal order to attorney in the "usual" attorney-client situation), *In re Grand Jury Proceedings (Malone)*, 655 F.2d 882, 885 (8th Cir. 1981), and *In re Klein*, 776 F.2d 628, 630-632 (7th Cir. 1985). The decisions involved are potentially very sensitive to factual variations, and it is therefore difficult to gauge the practical significance of apparent differences among the courts. Compare, *e.g.*, *In re Sealed Case*, 655 F.2d at 1302 (no immediate appeal, focusing on role of in-house counsel on particular facts) with *In re Sealed Case*, 737 F.2d 94, 97-98 (D.C. Cir. 1984) (R.B. Ginsburg, J.) (appeal allowed where former general counsel stated under

oath that he would not stand in contempt); compare *National Super Spuds, Inc.* v. *New York Mercantile Exchange*, 591 F.2d 174, 179-180 & n.7 (2d Cir. 1979) (Friendly, J.) (no appeal from order directed to responsible official of public agency) with *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1036 n.3 (2d Cir. 1984) (appeal ordinarily available from order directed to outside counsel); see also *In re Klein*, 776 F.2d at 631. Although it may ultimately be desirable for this Court to provide further guidance on the proper scope of the *Perlman* exception, there is no reason to do so in a case that has been voluntarily dismissed by the real parties in interest, and in which it is clear that appellate review would have been available in any event, if it had been desired, through the usual procedural mechanism of appeal from Bailin's citation for contempt.

Finally, petitioners argue (Pet. 31-34) that under *Reisman* v. *Caplin*, 375 U.S. 440 (1964), they would have had the right to appeal an order directing Bailin to comply with an administrative summons issued by the IRS, and that a parallel rule should apply in the case of a grand jury subpoena. In determining finality for purposes of appeal, however, this Court has distinguished sharply between cases in which a court enforces a grand jury subpoena, which is "ancillary to [a] judicial proceeding" that could be disrupted by an immediate appeal, and cases in which the court enforces an administrative summons, and in which the judicial enforcement proceeding provided for by statute is, from the court's point of view, "complete in itself." *Cobbledick*, 309 U.S. at 329-330; see also *Reisman*, 375 U.S. at 449 (citing *O'Connor* v.

O'Connell, 253 F.2d 365, 365-367 (1st Cir. 1958), which applied *Cobbledick*'s reasoning to enforcement of an IRS summons); *Church of Scientology*, 113 S. Ct. at 452 n.11. There is no reason to revisit that distinction in this case.[7]

3. Petitioners argue (Pet. 51-63) that the court of appeals erred in denying their alternative request for a writ of mandamus. As this Court has made clear, however, "the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations." *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34 (1980) (per curiam). In particular, mandamus is not to be used to "undermine the settled limitations upon the power of an appellate court to review interlocutory orders." *Id.* at 35, quoting *Will* v. *United States*, 389 U.S. 90, 98 n.6 (1967). Thus, mandamus "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.'" *Will*, 389 U.S. at 95, quoting *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943). "Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy." *Allied Chem. Corp.*, 449 U.S. at 35.

The court of appeals correctly applied those principles in this case. Pet. App. 18a-19a; see also, *e.g.*, *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1466-

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[7] Petitioners have offered no factual support for their suggestion (Pet. 34) that the IRS converted its original civil investigation into a criminal investigation, and ultimately into a grand jury proceeding, for the purpose of depriving Silva or Silva Harvesting of a right to appellate review of their privilege claims.

1467. Observing that mandamus should not be used "as a means of avoiding the final judgment rule" (Pet. App. 18a), the court concluded that "it was obviously within the district court's jurisdiction to rule on Silva's motion to quash, and to decide whether the subpoenaed materials [were] privileged" (*id.* at 18a-19a). The district court's decision therefore involved nothing like the "judicial usurpation of power" contemplated by this Court in *Allied Chemical*, 449 U.S. at 35. Moreover, on the facts of this case, in which accountant Bailin ultimately proved willing to go into contempt to preserve the taxpayers' ability to appeal, the parties seeking mandamus failed to demonstrate that they had "no other adequate means to attain the relief [they] desire[d]" or to show that their right to issuance of the writ was "clear and indisputable." *Ibid.* Even if the case were not moot, there would be no reason for further review.

CONCLUSION

The petition for a writ of certiorari should be dismissed as moot. Alternatively, the petition should be denied.

Respectfully submitted.

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OCTOBER 1995

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C-94-7008 WAI

IN RE GRAND JURY SUBPOENA DUCES TECUM
DATED MARCH 15, 1994, ISSUED TO
CHARLES D. BAILIN

[FILED Aug. 24, 1995]

ORDER

Upon application of the United States and good cause having been demonstrated, IT IS HEREBY ORDERED that the August 10, 1995, civil contempt of Charles Bailin be purged.

Dated: 8/24/95

/s/ William A. Ingram
WILLIAM A. INGRAM
United States District Judge